IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 885

MARY MOYLAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1969. The petition for a writ of certiorari was filed on November 25, 1969, more than 30 days later, and is thus out of time under Rule 22(2)

of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were entitled to have the jury instructed that it had the power and the right to acquit no matter how clearly guilty they were under the facts as found by it and the law as expounded to it by the court.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioners—Mary Moylan, Philip Berrigan, Thomas Lewis, George J. Mische, Thomas Melville, Marjorie Melville, John Hogan, James Darst, and Daniel Berrigan—were each convicted on counts 2, 3, and 4 of a four-count indictment charging that they willfully injured property of the United States, causing damage in excess of $100, in violation of 18 U.S.C. 1361 (count 2), willfully destroyed records filed in a public office of the United States, in violation of 18 U.S.C. 2071 (count 3), and willfully and knowingly interfered with the administration of the Military Selective Service Act, in violation of 50 U.S.C. App. 462(a) (count 4) (1 R. 11-17).[1] On November 8, 1968, petitioners Moylan, Marjorie Melville, Hogan, and Darst were sentenced to concurrent two-year prison terms

[1] Count 1, charging that petitioners conspired to commit the substantive offenses, was dismissed pursuant to the entry of a *nolle prosequi* by the government (1 R. 65-73).

on each count; petitioners Mische, Thomas Melville, and Daniel Berrigan, to concurrent three-year terms on each count; and petitioners Philip Berrigan and Lewis to three years and six months on each of counts 2 and 4 and three years on count 3, all three terms to run concurrently with one another and with the six-year sentences imposed on them in Criminal Case No. 27817 (a similar prosecution, involved in No. 884, this Term, pending on petition for a writ of certiorari filed contemporaneously with the instant petition) (1 R. 65-73). The court of appeals affirmed.

The undisputed evidence showed that at 12:50 p.m. on May 17, 1968, petitioners entered the office of Local Board No. 33 in Catonsville, Maryland, removed 378 Selective Service files to an adjacent parking lot, and burned them with homemade napalm (Pet. App. A2-A3). Petitioners, testifying in their own behalf, admitted their participation in the incident (4 R. 391-392; 5 R. 462, 503-505, 517, 543, 589, 603, 622, 680-681). Their asserted justification was that they wished to protest against the Vietnam conflict. Each acknowledged that he was fully aware at the time of the episode that his acts would hinder the administration of the Selective Service Act (4 R. 413-416; 5 R. 480, 511, 540, 563, 599, 619, 636, 704).

ARGUMENT

Petitioners' principal contention—that they were entitled to have the jury instructed that it had the power and the right to acquit no matter how clearly guilty they were of the offenses charged under the

facts as found by it and the law as expounded by the court—is without merit. *Berra* v. *United States*, 351 U.S. 131, 134; *Horning* v. *District of Columbia*, 254 U.S. 135, 138-139; *Hepner* v. *United States*, 213 U.S. 103, 114; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 101-103; *Driscoll* v. *United States*, 356 F. 2d 324, 327 (C.A. 1), vacated on other grounds, 390 U.S. 202; *Morris* v. *United States*, 156 F. 2d 525, 529 (C.A. 9). That the jury has the power to bring in a verdict in the teeth of both law and facts (*Horning* v. *District of Columbia*, *supra*, 254 U.S. at 138) does not mean, as the court of appeals noted, that the court is to encourage it in such lawlessness (Pet. App. A9). The issue is fully discussed in the opinion below (Pet. App. A6-A12) and there is no need to add to what is there said.

Petitioners also appear to argue that they were prejudiced when the court interrupted counsel's argument to the jury that it should exercise such power. Even if the interruption had been uncalled for, however, it did not constitute reversible error. The court had put defense counsel on notice before the final argument that it would interrupt any argument that the jury should decide the case on grounds of conscience, to remind the jury of their duty (Pet. 3), and the judge's statement of that duty in making the interruption was correct. As petitioners do not relate, counsel returned to the subject after the interruption and stated:

> The jury does not have to give any reasons for its verdict. It is responsible to no one for the reasons it decides. It must follow the law, and

> the judge will indicate that. But it need not answer to anyone for what it does. No reasons are required, no explanations. You may decide as you see fit from what you know about this case and from the law as the judge gives it. [6 R. 787].

Thus, defendants were allowed to notify the jury of its power and precluded only from expressly encouraging the jury to exercise it. Under these circumstances, and in view of the settled law which the court correctly stated in its admonition, the interruption cannot be termed prejudicial.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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